April 26, 2000

Ms. Jeanine Cadena
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel, L.L.P
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2000-1614

Dear Ms. Cadena:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134564.

The Town of Flower Mound (the "town") which you represent, received a request for "the public files relating to charges against Booker T. Rogers" regarding a specified incident. You claim that "the narrative of the incident report and the defendant's voluntary statement as well as the affidavit for the search and arrest warrant should be withheld from public disclosure in that it is information relating to a criminal investigation or prosecution that concluded in a result other than a conviction or a deferred adjudication." You contend this information is excepted from disclosure under section 552.108(a) of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.108 (a)(2) of the Government Code excepts from public disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication. You assert that the subject investigation did not result in conviction or deferred adjudication, yet you inform this office that "the defendant was given ten (10) years probation and registration as a sex offender." As your assertions present an apparent contradiction, we turn to an examination of the law governing the imposition of probated sentences at the time of the alleged offense, September 26, 1998.

The term "probation" in the context of criminal sentencing for felony offenses was formally defined as "the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended." Adult Probation, Parole and Mandatory Supervision Law, 67th Leg., R.S. ch. 141, § 2, 1981 Tex. Gen. Laws 353 (effective September 1, 1981)(codified as article 42.12 sec. 2(b), Crim. Proc. Code). However, the 73rd Legislature deleted this definition in its amendment of article

42.12 of the Code of Criminal Procedure[1], and enacted the following provision:

> On and after September 1, 1993, a reference in the law to "probation" or "deferred adjudication" means "community supervision," as that term is defined in Section 2, Article 42.12, Code of Criminal Procedure, as amended by Section 4.01 of this article. A defendant who is placed on probation or who receives deferred adjudication before September 1, 1993, is considered on and after September 1, 1993, to have previously been placed on community supervision.

Act of May 29, 1993, 73rd Leg., R.S. ch. 902 § 4.04(a), 1993, Tex. Gen. Laws 3586, 3748.

"Community supervision" as referred to above,

> means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:
>
> > (A) criminal proceedings are deferred without an adjudication of guilt; or
> >
> > (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

Crim. Proc. Code art.42.12 sec. 2(2).

In pertinent part, section 1 of the article informs us that

> [i]t is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision[.]

Under section 3 of the article, a judge "after conviction or a plea of guilty or nolo contendere may suspend the imposition of the sentence and place the defendant on community supervision." Under section 4 of the article, "a judge shall suspend the imposition of the sentence and place the defendant on community supervision if the jury makes that recommendation" in a verdict that imposes confinement as punishment.

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[1] Act of May 29, 1993, 73rd Leg., R.S. ch. 900 §4, 1993, Tex. Gen. Laws 3586, 3716-43.

Under section 5 of the article, a judge may "defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision" on a plea of guilty or nolo contendere and presentation of evidence that substantiates the guilt of the defendant.

In clarifying these provisions, the court distinguished community supervision imposed with deferred adjudication under section 5 from community supervision imposed under sections 3 or 4, which it characterized as "regular community supervision." *Rodriguez v. State*, 939 S.W.2d. 211 (Tex. App.-- Austin 1997) (no writ). The court first noted that the terms "probation" and "community supervision" generally mean the same thing and are used interchangeably. *Id.* The court then explained,

> [w]hen a defendant is placed on regular community supervision, **he or she is convicted of the offense charged** and the punishment is assessed by judge or jury. The imposition of the sentence is suspended and the defendant is placed on regular community supervision. The original plea may be "not guilty." The option of deferred adjudication, by its very terms, is limited to defendants who plead guilty or nolo contendere before the trial court. . . . The essence of deferred adjudication is that a defendant is not found guilty and is not convicted of any offense.

Id. (emphasis added).

We note that the *Rodriguez* court's ruling is consistent with the statutory definition of "community supervision." *See* Code Crim. Proc. Code art. 42.12 § 2(2). Hence, an imposition of "community supervision," which includes the probation of a criminal sentence, requires either a conviction or a deferred adjudication of the case. As you inform us that a probated sentence of ten years was imposed in the subject case, we conclude that the responsive information is not excepted from public disclosure by section 552.108(a)(2) of the Government Code. As you have not demonstrated how release of this information would interfere with law enforcement, we conclude that the responsive information is not excepted from public disclosure by section 552.108(a)(1) of the Government Code. Therefore, the information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 134564

Encl Submitted documents

cc: Mr. John R. Klinger
Senior Field Claims Representative
P.O. Box 10381
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(w/o enclosures)